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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RYLE ADAMS et al., Plaintiffs and Respondents, v. RICHARD DEVLIN et al., Defendants and Appellants.	E055375 (Super.Ct.No. CIVVS703154) OPINION

APPEAL from the Superior Court of San Bernardino County. Gilbert G. Ochoa, Judge. Affirmed in part; reversed in part with directions.

Law Offices of Sharon L. Crommett, Sharon L. Crommett; Esner, Chang & Boyer and Andrew N. Chang for Defendants and Appellants.

The Potier Law Group and Amanda J. Potier for Plaintiffs and Respondents.

I

INTRODUCTION

Defendants Richard Devlin, Jacqueline Devlin, Fred Gildner and Darlene Gildner (defendants) appeal judgment entered following a court trial, in which the trial court

found in favor of plaintiffs Ryle Adams and Gwen Adams (plaintiffs) on their causes of action for quiet title to a prescriptive easement and ejection. The trial court concluded plaintiffs met their burden of establishing a prescriptive easement over a 10-foot strip of land running along the north side of defendants' property, which was adjacent to plaintiffs' property. The court also found that the easement did not include the erection of structures, such as plaintiffs' address sign, which plaintiffs were therefore required to remove. In addition, the court required defendants to remove the chain-link fence they constructed on the easement portion of their property.

Defendants contend the trial court erred in granting plaintiffs a prescriptive easement. Defendants argue the prescriptive easement was the equivalent of a fee interest and therefore improperly dispossessed defendants of their real property.

We conclude plaintiffs established a prescriptive easement on defendants' property (lot 43) for convenient ingress and egress onto plaintiffs' property. The trial court, however, erred in granting plaintiffs a prescriptive easement to tend plaintiffs' yard and trees located on the easement property. The portion of the judgment allowing such prescriptive easement use is therefore reversed and ordered stricken from the judgment. In all other regards, the judgment is affirmed.

II

FACTS

In 1970, plaintiffs purchased a vacant lot, located at 2300 Lausanne Drive, in Wrightwood (lot 44). The following year, plaintiffs built a two-story cabin on the lot. Plaintiffs used a 10-foot strip of land on lot 43, south of their property, not realizing the

10-foot strip was not part of their property. The 10-foot strip of land extended from the front to the back of lot 43, located at 2310 East Canyon. In 1971, believing the 10-foot strip was part of their property, Ryle Adams placed an address sign for his cabin where he believed the boundary line was for his property. The sign said, "2300 Adams." Ryle believed he placed the address sign on his own property at the boundary line, whereas it actually was posted on the 10-foot strip.

In 1976 and 1985, Ryle Adams and his son-in-law, David Leach, planted shrubs and trees believed to be Giant Sequoias on the 10-foot strip, put a bird feeder between the trees, put decorative rocks around the trees and planters, and irrigated the strip of land. In 1982, plaintiffs extended their deck around their house. The deck on the front of their house, was extended out eight feet, to the boundary line between lots 43 and 44. Plaintiffs' daughter, Chris Leach, and son-in-law, David Leach, moved into plaintiffs' cabin in 1985 and have lived there permanently since then. After the Leaches moved in, plaintiffs visited the property every couple of weeks.

Up until defendants purchased lot 43, plaintiffs and the previous owners of lot 43, Brian and Elizabeth Tracy (the Tracys), believed plaintiffs owned the 10-foot strip. The Tracys therefore never maintained the 10-foot strip or gave plaintiffs permission to use the 10-foot strip, since the Tracys did not realize the property belonged to them. The Tracys did not have a survey done or receive any information from the previous owner establishing the lot 43 boundaries. The Tracys were unaware of where the actual lot 43 boundaries were until after they sold the property to defendants in 2005. When the Tracys purchased lot 43 in 1976, the lot was vacant.

In 2005, Richard Devlin sent plaintiffs a letter stating that plaintiffs must remove a portion of their deck because it encroached on defendants' property and defendants were going to erect a five-foot chain-link fence. Plaintiffs objected to defendants erecting a fence or cutting down the trees on the 10-foot strip. The parties agreed, through their attorneys, that nothing would be done until the dispute was resolved. Nevertheless, Richard erected a five-foot chain-link fence down the length of the easement, approximately three inches from plaintiff's property. The fence impeded plaintiffs' ability to water the plants on the 10-foot strip or gain access to the 10-foot strip.

On September 25, 2007, plaintiffs filed a complaint against Richard Devlin for (1) quiet title to a prescriptive easement, (2) ejection, (3) trespass, and (4) temporary restraining order (TRO) and preliminary and permanent injunctions. Plaintiffs requested the court to find that they had a prescriptive easement over the 10-foot strip, precluding defendants from interfering with plaintiffs' access to the strip of land. Plaintiffs amended the complaint to add Fred Gildner, Darlene Gildner, and Jacqueline Devlin as defendants.

In January 2008, the trial court granted a preliminary injunction ordering defendants to refrain from blocking access to the 10-foot strip or building on lot 43. The court further ordered defendants to allow plaintiffs access to the 10-foot strip to maintain the landscape on the property, roads, and septic tank.

Ryle Adams's Trial Testimony

The matter was tried in September 2011. During the court trial, Ryle testified that defendants' chain-link fence blocked plaintiffs' ability to enter plaintiffs' cabin through the front entrance. When Ryle extended the deck and he and David planted trees on the

10-foot strip, they believed plaintiffs owned the 10-foot strip. Ryle did not have a survey done when he bought his property. The Tracys purchased lot 43 and two additional adjacent vacant lots. They built their cabin on the lot next to lot 43. Lot 43 is between plaintiffs' property, lot 44, and the lot with the Tracys' cabin. Lot 43 has always been vacant land. There was a picnic table and horseshoe pit on Lot 43, but not on the 10-foot strip of land. Ryle and Brian Tracy built the horseshoe pit. The Tracys had social gatherings with other neighbors on lot 43. The gatherings were not held on the 10-foot strip. Plaintiffs were the only people who used the 10-foot strip. The Tracys were not permanent residents. They usually stayed in their cabin about twice a month. Plaintiffs and the Tracys were very close friends.

The trees, shrubs, and irrigation on the 10-foot strip would have been visible to the Tracys. The Tracys never complained about the trees, shrubs, and irrigation on the strip. The Tracys never maintained the 10-foot strip of land. Plaintiffs and the Leaches had always maintained the 10-foot strip, which included watering the trees with a hose and clearing the land in response to fire department letters requesting clearance of weeds and fire hazardous material from the land around plaintiffs' property.

Ryle first became aware that the 10-foot strip was outside the boundary of his property in October 2005, when he received a letter from Richard, stating that part of plaintiffs' porch and driveway was on his property. Richard provided Ryle with a copy of his survey. Ryle had another survey done, which showed that Richard's survey was incorrect. This was the first time Ryle had a survey done. His survey showed that

plaintiffs' deck and driveway did not encroach upon defendants' land and the boundary line was where defendants placed the chain-link fence.

David Leach's Testimony

David Leach testified that he had been living in plaintiffs' cabin with his family since 1985, and had maintained the 10-foot strip of land since then, including the trees and rose bushes. He trimmed the trees and used water from plaintiffs' property to water. When David moved there, he believed the property boundary line was beyond the big trees. The Tracys also assumed this. The Tracys never maintained the 10-foot strip while David was living there. David planted two of the trees, installed the bird feeder, and put decorative rocks around the trees and planters to retain water in the area.

David socialized with the Tracys. The Tracys' cabin was down the street. It was not on lot 43. The Tracys never gave David permission to plant and maintain the 10-foot strip. They also never said it was their land or objected to David's activity on the land. It was always assumed the 10-foot strip belonged to plaintiffs. Defendants' chain-link fence blocked access to the back of plaintiffs' property from the front of their cabin. The fence also impeded plaintiffs' ability to maintain the trees and planters. David had to water the plants through the chain-link fence.

After plaintiffs provided defendants with a copy of plaintiffs' survey, defendants had a third survey done, which was slightly different from the other two surveys. It is unclear where the property line actually is. The boundary line appears to be approximately where the chain-link fence was erected.

Brian Tracy's Testimony

Brian Tracy testified he purchased 2310 East Canyon (lot 43), which was a vacant lot, in 1976. When he purchased the lot, he did not have a survey done or receive anything from the previous owner regarding the exact lot boundaries. He looked at the title company plot map and did a "Kentucky-lineage type of a survey." Brian owned three lots, including lot 43 and lot 42, which was to the east of lot 43. Brian built his cabin on lot 42. He also owned another lot directly behind lot 43. There was only one big tree on lot 43. Brian concluded this based on the plot map. The tree was not a Sequoia and had not been planted. It had grown naturally. It appeared to be a Jeffery Pine. There was a Sequoia behind the big tree. Ryle planted two Sequoias on the 10-foot strip in the late 1970's.

Brian did not know where the exact west boundary line for lot 43 was. He guessed it was somewhere between the giant tree and the beginning of plaintiffs' driveway. When plaintiffs built their wrap-around deck in the mid-1980's, Brian did not believe the deck encroached on his property. Brian did not object to plaintiffs improving their property, even if it was on or near the property line, because the property improvements were great for the neighborhood and the Tracys and plaintiffs had a wonderful relationship. Brian did not become aware of the boundary line until defendants bought the lot in 2005, when defendants did a survey and Richard told Brian where the boundary lines were. Defendants also purchased the Tracys' other two adjacent lots.

Brian never planted or maintained the trees, rose bushes, or yard landscaping, located on the 10-foot strip. The picnic table was not on the 10-foot strip. Brian did not believe the 10-foot strip was part of his property. He therefore did not give plaintiffs permission to plant and maintain anything or irrigate the 10-foot strip. It never came up or was an issue. The Tracys visited their cabin on weekends up until 2003. From 2003 until 2005, the Tracys were permanent residents at their cabin. In response to Brian's testimony, David testified that Brian was incorrect about the trees. David planted both trees, the big tree and the Sequoia.

Richard Devlin's Testimony

Richard Devlin testified for the defense as follows. Richard has lived in Wrightwood for 42 years. He and his wife own a realty company. When defendants purchased the lots from the Tracys, they intended to develop the lots. Defendants had built several other projects together. While living in Wrightwood, Richard had driven by lot 43 at least once a week. The Devlins and Tracys were good friends. Brian told Richard the big tree was his tree. The plaintiffs' address sign is on the northerly portion of lot 43, six to 15 feet from the road, on the public utilities easement. Richard relied on, not only the title company documents describing lot 43 to determine the boundary lines, but also the survey. Richard did not know the exact boundaries of the lots when he purchased the lots. He did not get the survey until after he purchased lot 43. There was therefore no way for him to know whether the 10-foot strip was owned by plaintiffs or the Tracys. Richard intended to build on lot 43. Because of the preliminary injunction

prohibiting defendants from building on the lot, defendants have suffered economic harm.

Richard did not intend to build up to the property line on lot 43, since the county required a setback from the boundary line of 10 percent of the width of the lot on each side of the lot. Before Richard purchased lot 43, he knew plaintiffs' deck was on the boundary line. Defendants' fence erected on lot 43 was three inches inside the survey boundary line. It was not within the public easement area. Richard acknowledged that his original survey was incorrect, but claimed his second survey was correct.

After listening to closing argument, the trial court took the matter under submission and then entered judgment, finding in favor of plaintiffs on their causes of action for quiet title to a prescriptive easement and ejectment. The court found plaintiffs had established a prescriptive easement on lot 43, which "includes the use and enjoyment for egress and ingress and the tending of Plaintiffs' yard and trees within" the easement. The court also found that the easement did not include the erection of structures, such as plaintiffs' address sign, which plaintiffs were therefore required to remove. In addition, the court found that defendants were required to remove the chain-link fence on the easement property. The court concluded plaintiffs' trespass cause of action was moot.

III

PRESCRIPTIVE EASEMENT

The only issue to be resolved in this case is the propriety of the trial court's granting plaintiffs a prescriptive easement over a 10-foot strip of land running along the side of lot 43, owned by defendants. Whether plaintiffs have established the elements of

a prescriptive easement is normally a factual question (*Silacci v. Abramson* (1996) 45 Cal.App.4th 558, 562 (*Silacci*)), but when the material facts are essentially undisputed, as in the instant case, resolution of this case becomes a question of law as to whether the easement is a proper prescriptive easement or, alternatively, an improper grant of fee simple title in the land of another. (*Id.* at p. 562.)

An easement, as opposed to title ownership of land, "is merely a right to use the land of another. With an easement, the owner of the burdened land is said to own the servient tenement, and the owner of the easement is said to have the dominant tenement. Every incident of ownership not inconsistent with the enjoyment of the easement is reserved to the owner of the servient tenement. An easement acquired by prescription is one acquired by open and notorious use. For example, if one uses a road across the land of another for a certain period, one may acquire an easement by prescription. [Citations.]" (*Silacci, supra*, 45 Cal.App.4th at p. 562.)

Case law on prescriptive easements has consistently rejected the granting of a prescriptive easement for the maintenance of a yard encroaching on a neighbor's property. (*Raab v. Casper* (1975) 51 Cal.App.3d 866, 877 (*Raab*); *Silacci, supra*, 45 Cal.App.4th at p. 564; *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1306-1307 (*Mehdizadeh*); *Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1094 (*Harrison*).) In *Raab*, the defendants built a family home, in which part of their driveway, utility lines, fences, shrubs, fruit trees, and landscaping, were on the plaintiffs' property. The trial court found that the defendants had established their driveway, utility lines, yard, and landscaping on the plaintiffs' land, and had acquired a prescriptive easement over this

portion of the plaintiffs' property. (*Raab,* at p. 876.) The *Raab* Court of Appeal reversed, concluding that an easement was improper for maintaining the defendants' yard and landscaping because it gave defendants unlimited use of the plaintiffs' yard around defendants' home. (*Id.* at p. 877.) The easement was designed to exclude the plaintiffs from the easement portion of the plaintiffs' property. In effect, the easement, created the practical equivalent of an estate, without the defendants establishing adverse possession. (*Id.* at p. 877.)

The *Raab* court explained that "[t]he evidence and findings do not sustain the award. There is a difference between a prescriptive use of land culminating in an easement (i.e., an incorporeal interest) and adverse possession which creates a change in title or ownership (i.e., a corporeal interest); the former deals with the use of land, the other with possession; although the elements of each are similar, the requirements of proof are materially different. [Citations.] [¶] As the difference between prescriptive use and adverse possession is sometimes obscure, so is the difference between an exclusive easement and outright title." (*Raab, supra*, 51 Cal.App.3d at p. 876.) The *Raab* court noted that "An exclusive interest labeled 'easement' may be so comprehensive as to supply the equivalent of an estate, i.e., ownership. In determining whether a conveyance creates an easement or estate, it is important to observe the extent to which the conveyance limits the uses available to the grantor; an estate entitles the owner to the exclusive occupation of a portion of the earth's surface. [Citations.]" (*Ibid.*)

The facts in *Raab* are similar to those in the instant case. In both cases, the trial court granted easements to allow maintenance of an unfenced yard and landscaping on a

neighbor's property. The easement here allowed plaintiffs to use the 10-foot strip of land for ingress and egress to their property and to maintain trees and plants on the easement property. As in *Raab*, we conclude the trial court erred in granting a prescriptive easement for the purpose of allowing plaintiffs to maintain trees and landscaping on defendants' property.

Defendants cite *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041 (*Otay*) for the proposition the trial court improperly granted plaintiffs an exclusive prescriptive easement to maintain the trees. *Otay* is not dispositive because the instant case does not concern an exclusive prescriptive easement granted to a public utility for public health or safety purposes. In *Otay*, the Otay Water District built a reservoir, which was partially on the defendant's land. Because of an erroneous grant deed and survey, the water district was initially unaware the reservoir was not entirely on property owned by the water district. The water district eventually discovered the initial survey may have been erroneous and conducted a new survey confirming that the reservoir was partially located on the defendant's property. (*Id.* at pp. 1044-1045.) The water district then filed a quiet title action for an exclusive easement. The trial court granted the water district's motion for summary judgment on the prescriptive easement issue, finding that the prescriptive easement could remain exclusive. (*Id.* at p. 1045.)

On appeal, the *Otay* court affirmed, finding that the water district had established all of the elements of a prescriptive easement. (*Otay*, *supra*, 1 Cal.App.4th at pp. 1045-1047.) Those elements are: "'(a) open and notorious use; (b) continuous and uninterrupted use; (c) hostile to the true owner; (d) under claim of right; and (e) for the

statutory period of five years. (Civ. Code, § 1007; Code Civ. Proc., § 321).' [Citations.]" (*Id.* at p. 1045.)

In the instant case, plaintiffs established these elements as well. Defendants argue, however, that the trial court, in effect, improperly granted adverse possession or an exclusive easement for the maintenance of the trees and landscaping on the easement property. Defendants assert that plaintiffs cannot establish adverse possession because they did not pay the taxes on the easement property, which is required in order to establish adverse possession. (*Otay, supra,* 1 Cal.App.4th at p. 1048; *Silacci, supra,* 45 Cal.App.4th at p. 562.) Both parties acknowledge plaintiffs have not established adverse possession, and plaintiffs note on appeal that they never made a claim of adverse possession. Plaintiffs' counsel conceded at trial that plaintiffs were not seeking adverse possession. It is undisputed plaintiffs have not established adverse possession to the easement property.

With regard to an exclusive prescriptive easement, the court in *Otay* rejected the defendants' argument a prescriptive easement cannot be exclusive. (*Otay, supra,* 1 Cal.App.4th at pp. 1047-1048.) In addressing the issue, the *Otay* court explained that "'"The scope of a prescriptive easement is determined by the use through which it is acquired."' [Citations.][] '[T]he *only* limitation [on future use of a prescriptive easement] is imposed by the use made . . . during the statutory period'; [citations] ['Once a prescriptive easement has been acquired, the location and extent of its use is determined by the use experienced during the prescriptive period'].)" (*Id.* at p. 1047.) Here, the

prescriptive easement was limited to its historical use of ingress and egress onto plaintiffs' property and to maintain the trees and other landscaping on the easement land.

The *Otay* court further explained that, "while an exclusive easement 'is an unusual interest in land' [citation], where, as here, the use during the statutory period was exclusive, a court may properly determine the future use of the prescriptive easement may continue to be exclusive. The court's ruling is particularly justified on this record where Otay submitted uncontested evidence showing Beckwith's proposed recreational use would unreasonably interfere with Otay's right to continue operating a reservoir. Otay established its exclusive use is necessary to prevent potential contamination of the water supply and for other health and safety purposes." (*Otay, supra,* 1 Cal.App.4th at pp. 1047-1048.) Here, the easement is not granted for an unusual, exclusive land use necessary for public health or safety purposes. (*Id.* at p. 1048.)

In *Silacci, supra,* 45 Cal.App.4th 558, which involved an easement for maintaining a fenced-in yard, the court reversed the trial court's ruling granting an exclusive prescriptive easement. In doing so, the *Silacci* court distinguished *Otay, supra,* 1 Cal.App.4th 1041, explaining that "The *Otay Water Dist.* case must be limited to its difficult and peculiar facts. A public water company's right to keep drinking water safe from contamination must be given precedence. An exclusive prescriptive easement is, nonetheless, a very unusual interest in land. The notion of an exclusive prescriptive easement, which as a practical matter completely prohibits the true owner from using his land, has no application to a simple backyard dispute like this one. An easement, after all, is merely the right to use the land of another for a specific purpose—most often, the

right to cross the land of another. An easement acquired by prescription is one acquired by adverse use for a certain period. An easement, however, is not an ownership interest, and certainly does not amount to a fee simple estate. To permit Abramson to acquire possession of Silacci's land, and to call the acquisition an exclusive prescriptive easement, perverts the classical distinction in real property law between ownership and use. The trial court's order here amounted to giving Silacci's land completely, without reservation, to Abramson. This the court did, using the term 'exclusive prescriptive easement,' an unusual doctrine which does not apply." (*Silacci, supra,* 45 Cal.App.4th at p. 564.)

Under similar facts, the court in *Mehdizadeh, supra,* 46 Cal.App.4th 1296, relied on *Raab, supra,* 51 Cal.App.3d 866, and distinguished *Otay* as being limited to a rare instance of granting an exclusive prescriptive easement, based on public health and safety concerns. (*Mehdizadeh,* at pp. 1306-1307.) In *Mehdizadeh*, the plaintiff brought an action against his neighbors, seeking a prescriptive easement over property the plaintiff had maintained as his own fenced-in yard on the neighbors' property. On appeal, the *Mehdizadeh* court reversed, holding that the trial court erred in granting such a broad prescriptive easement subject to restrictions and conditions that denied the property owners virtually all use of their property and, in effect, improperly amounted to adverse possession which excluded the defendants from entering or using their land. (*Id.* at pp. 1300, 1305, 1308.)

In *Harrison, supra,* 116 Cal.App.4th 1084, the court similarly held the defendant was not entitled to either an exclusive or nonexclusive prescriptive easement to maintain

landscaping, as well as a woodshed, on the plaintiff's property. (*Id.* at p. 1094.) As to the woodshed, the court held the trial court could not grant an exclusive or nonexclusive prescriptive easement to land on which the defendant constructed a woodshed because such use of the plaintiff's property, as a practical matter, completely prohibited the true owner of the property from using his land. (*Id.* at p. 1093.)

As to the defendant's landscaping on the plaintiff's property, the *Harrison* court concluded the defendant was also not entitled to either an exclusive or nonexclusive prescriptive easement. (*Harrison, supra,* 116 Cal.App.4th at pp. 1093-1094.) The defendant's landscaping on the plaintiff's property included a Christmas tree, railroad tie planter boxes placed along the property line, with a row of trees planted in the boxes, a soaker hose to water the plants, and part of the defendant's underground sprinkler system. (*Id.* at p. 1088.)

The court in *Harrison* rejected the defendant's argument that the landscaping was not an exclusive use because there were no physical or practical barriers excluding the plaintiffs from the landscaped area and the landscaping was located within the plaintiff's property setback area along the property line. The *Harrison* court explained: "That under the subdivision restrictions and the local zoning ordinance neither party may lawfully erect a dwelling or residence within five feet of the property line does not mean either owner is deprived of the right to determine what other use to make of the setback area on his or her property consistent with that limitation. Here, however, Welch's landscaping effectively prevents the Harrisons from determining how the area of the encroachment is to be used." (*Harrison, supra,* 116 Cal.App.4th at p. 1094.) The court

added that, although the landscaping was an attractive border for both lots and the Harrisons were not physically excluded from the landscaped encroachment area, "such facts do not make the encroaching use any less exclusive. It is the exclusivity of the use of the surface of the land in the encroachment area that is determinative, and the landscaping scheme of Welch has essentially co-opted the encroachment area to an exclusive use designed by Welch." (*Ibid.*)

The *Harrison* court therefore concluded that the landscaping completely prohibited the Harrisons from using the landscaped part of their land. (*Harrison, supra,* 116 Cal.App.4th at p. 1094.) "They cannot put in a driveway on that portion of their lot or use it to run their utility lines, as they had planned to do. They cannot install a fence along the boundary line—a use that even Welch acknowledges is common in 'the area between two adjacent homes in close proximity.' Nor can they use this portion of their property for any other practical purpose. Welch contends the Harrisons 'could, indeed, picnic, camp, dig a well, and undertake any number of other activities on the land'; however, she fails to point to any evidence in the record that reasonably supports that contention. [¶] Because of the exclusive nature of the uses Welch was making of the encroachment area, the trial court did not err in refusing to grant Welch a prescriptive easement to maintain the woodshed and the landscaping on the Harrisons' property." (*Id.* at p. 1094.)

In the instant case, the trial court judgment states that plaintiffs are granted an easement that "includes the use and enjoyment for egress and ingress and the tending of *Plaintiffs' yard* and trees within" the easement area (10-foot strip). (Italics added.)

Under *Silacci, supra,* 45 Cal.App.4th 558, *Harrison, supra,* 116 Cal.App.4th 1084, and *Raab, supra,* 51 Cal.App.3d 866, an easement that grants plaintiffs unrestricted use of the easement area as plaintiffs' own yard is, in effect, granting plaintiffs an exclusive easement or fee simple, which is improper. On the other hand, granting an easement merely allowing plaintiffs access to their property is permissible, since such use is not an exclusive use precluding defendants from also using the property in other ways. Therefore the language in the judgment referring to "the tending of Plaintiffs' yard and trees" must be stricken such that the prescriptive easement is limited to plaintiffs using the easement property solely for the purpose of entering and leaving their property.

Case law has consistently rejected prescriptive easements over a neighbor's property for the purpose of maintaining a yard and landscaping on the servient tenement. (*Raab, supra,* 51 Cal.App.3d 866, *Silacci, supra,* 45 Cal.App.4th 558, *Mehdizadeh, supra,* 46 Cal.App.4th at pp. 1306-1307, *Harrison, supra,* 116 Cal.App.4th 1084.) This is because such an easement is a divestment of the majority of the servient tenement property owners' customary rights to their property. Plaintiffs' right to use the 10-foot strip for the tending of plaintiffs' yard and trees "looks more like 'occupancy,' possession, and ownership." (*Mehdizadeh, supra,* 46 Cal.App.4th at p. 1306; *Raab,* at p. 876.) The easement, in effect, conveys to plaintiffs property for a yard, which includes trees and shrubs. Defendants are precluded from interfering with plaintiffs' use of the land as a yard, including cutting down the trees, removing the bushes, landscaping the property as defendants wish, and using the land in other ways impeded by the presence of the trees and other landscaping.

Plaintiffs argue the easement was only to allow watering the trees but the language of the judgment reflects it was for more than that. It allows plaintiffs to maintain a yard on the 10-foot strip, which in its current state included large trees, rose bushes, decorative stones, and a bird bath. This precluded defendants from removing plaintiffs' landscaping and using the land for some other purpose, thereby dispossessing defendants of their property.

Plaintiffs rely on *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, in support of the proposition this court should affirm the prescriptive easement based on the trial court's equity power. Plaintiffs' reliance on *Hirshfield* is misplaced. *Hirshfield* is not a prescriptive easement case. It was decided based solely on equity principles, and the parties in the instant case did not argue the easement was created in equity. The issue before the trial court here was whether there was a prescriptive easement. Addressing this issue, the trial court stated in the judgment it was granting a prescriptive easement. There was no mention of balancing the parties' equitable rights or granting equitable rights as to plaintiffs' use of the easement property.

We conclude that, under the undisputed facts and case law, the trial court erred in granting plaintiffs a prescriptive easement for "tending of Plaintiffs' yard and trees" within the easement property. Such an easement, in effect, provided plaintiffs with a yard in which plaintiffs had unrestricted discretion to landscape and maintain the property. Such use amounted to an improper granting of a fee simple interest in the land of another. (*Silacci, supra,* 45 Cal.App.4th at p. 562.)

IV

DISPOSITION[1]

The judgment is reversed as to the trial court's finding of a prescriptive easement for "the tending of Plaintiffs' yard and trees" within the easement property. Accordingly, the following language in the judgment is ordered stricken from the judgment: "the tending of Plaintiffs' yard and trees." The judgment is affirmed in all other regards.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

KING
J.

[1] Defendants' request for judicial notice is granted as to (1) San Bernardino County Code, Title 8, Development Code, Chapter 82.04 Residential Land Use Zoning Districts, Table 82-9B, Residential Land Use Zoning District Development Standards Mountain Region and (2) Assessor's Map, Book 0356, page 36 San Bernardino County, Tract No. 7146, M.B. 92/19-21. (Evid. Code, § 452, subds. (b) & (h).)